In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 955

RICHARD HOWARD, a/k/a JOHN W. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-4) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1964. A petition for rehearing was denied on March 5, 1964. The petition for a writ of certiorari was filed on March 27, 1964. The juris-

diction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the evidence supports petitioner's conviction for narcotics offenses.

STATEMENT

In the United States District Court for the Northern District of Illinois, petitioner and codefendant Herman Taylor were tried before the court under an indictment charging them in three counts with (1) transporting a narcotic drug in violation of 21 U.S.C. 174; (2) selling a narcotic drug without a written order form in violation of 26 U.S.C. 4705(a); and (3) conspiring to violate 21 U.S.C. 174 (D.A. 6-8).[1] Petitioner was convicted and sentenced under the first two counts to concurrent terms of six years' imprisonment; he was acquitted under the third count; and codefendant Taylor was acquitted under all counts (D.A. 12-13, 27). The court of appeals affirmed unanimously (Pet. App. 1-4).

The evidence introduced at the trial may be summarized as follows:

William H. Turnbou, a federal narcotics agent, testified that about 3:30 a.m. petitioner, codefendant Taylor and a special employee named Roy Saunders visited a Chicago motel room where Turnbou was stay-

[1] "D.A." refers to petitioner's appendix in the court of appeals.

ing. After Saunders introduced Agent Turnbou as a "fellow from Detroit", Turnbou arranged to purchase $1200 worth of cocaine from petitioner. Petitioner took the money, and while Turnbou and Taylor remained in the room, petitioner left with Saunders (D.A. 20-21). About 4 a.m. petitioner returned alone and said that he would not give anything to Turnbou. However, Saunders appeared as petitioner started to leave, and petitioner handed a tin-foil package to Saunders, who in turn handed the package to Agent Turnbou (D.A. 21). The package was later shown to contain 19.3 grams of the narcotic drug cocaine hydrochloride (D.A. 11, 21, 26).

Petitioner testified that the sale was made to Saunders rather than to Agent Turnbou. According to his version of the events, he was sitting in a tavern with Helen Robertson around midnight when Saunders came in with three friends and asked him to find some cocaine (D.A. 27-28). Some time later he drove to the motel with Miss Robertson in her automobile, a red Corvette, and met Saunders in the parking lot. After Saunders gave $700 to Miss Robertson, she and petitioner drove away, spent the money, and returned with cocaine an hour or two later. Petitioner went to the motel room but was told that Saunders was across the street in a bar (D.A. 28). He spoke to Saunders in the bar, the two walked across the street to the motel parking lot, and there he gave Saunders the cocaine (D.A. 28-29). Helen Robertson's testimony corroborated petitioner's account of the sale (D.A. 30.)

A narcotics agent who had Saunders under observation saw him go from a pool hall to a tavern shortly after midnight. About 1:30 a.m., petitioner entered the same tavern and remained there for ten minutes. A short time later, Saunders returned to the pool hall. About 2:30 a.m. petitioner and Taylor met Saunders outside the pool hall, and the three drove in Saunders' red Cadillac to the motel where agent Turnbou was staying. Petitioner stepped out of the car and walked down an alley behind the motel. Twenty minutes later, he returned and went with Saunders and Taylor to Agent Turnbou's room. After another twenty minutes had passed, petitioner and Saunders left the room—Saunders walking across the street to a bar and petitioner disappearing down the same alley. After having been away some fifteen minutes, petitioner returned to the room and, a few minutes later, Saunders left the bar and also went to the room (D.A. 25). A little later, petitioner and Saunders departed in the latter's Cadillac (D.A. 26).

A third narcotics agent testified that he had petitioner under observation all night except for the period between 9:30 p.m. and 1:30 a.m., and that he never saw petitioner in the company of a woman (D.A. 32). The special employee, Saunders, did not testify.

ARGUMENT

Contrary to petitioner's contention, the testimony of the three narcotics agents provided more than sufficient evidence to support his conviction for selling

cocaine without a written order form to Agent Turnbou, as charged in the second count of the indictment. The fact that petitioner and Helen Robertson testified to a different version of the events—that the sale was to the special employee, Saunders, rather than to Turnbou—only created an issue of credibility which the trier of fact could and did resolve in favor of the government. It is true that the trier of fact, in weighing the evidence, could infer from the government's failure to call Saunders to testify that his evidence would not have been favorable to the government. *E.g.*, *United States* v. *Di Re*, 332 U.S. 581, 593; *United States* v. *Brown*, 236 F. 2d 403, 405-406 (C.A. 2); *Yaw* v. *United States*, 228 F. 2d 382 (C.A. 9); 2 Wigmore, *Evidence*, Sec. 285 (3d ed., 1940); McCormick, *Evidence*, Sec. 249 (1954). However, the inference is not mandatory and may be given such weight as is appropriate in the circumstances. *Ibid.* The failure of Saunders to testify was only one of many factors which the trial judge weighed in assessing the credibility of the witnesses and does not give rise to an issue warranting review on appeal. *United States* v. *Brown*, *supra*, at 406.

In any event, since petitioner was sentenced concurrently, his conviction must be affirmed unless the evidence was insufficient to support the first count as well as the second count of the indictment. *E.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359. Petitioner's testimony that he sold the cocaine to Saunders, rather than to Turnbou, would not constitute a defense to the first count which charged him with transporting narcotics in violation of 21 U.S.C. 174.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE WIESEMAN,
Attorneys.

APRIL 1964

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 729075 897